



# FRAND DEVELOPMENTS IN INDIA

Mrs. Arti Ashokrao Dive

I/c Principal, B. K. Mercantile Bank Law College, Palanpur, Gujarat, India.

## ABSTRACT

In India, the consumer electronics market has exploded in the last two decades, particularly in the telecoms sector. The government has paid special attention to this sector in order to expand its e-governance programmes in rural areas and connect communities for direct benefit programmes, as well as to provide health, education, financial, and information services. Because the consumer electronics industry, particularly telecoms equipment and mobile devices, requires interoperability, there is an increasing demand for technology standardisation. This enables numerous manufacturers to enter the market with compatible products, boosting fair competition. In addition, problems arising from the adoption of standards in consumer electronic products were commonplace in the business. The Competition Commission of India has received several cases involving standard essential patents (SEPs) and fair, reasonable, and non-discriminatory (FRAND) promises (CCI). These cases involve well-known technological businesses that received SEPs for their telecommunications-related innovations.

**KEYWORDS:** SEP, Frand, India, Competition Commission.

## INTRODUCTION:

Standard setting organisations (SSOs) are trade associations that establish industry standards in a variety of key technology fields. Technology standards have enabled mobile phones to interact with each other, operate on the internet, and so on in the Information and Communications Technology ("ICT") industry. India has a long history of developing various types of standards through the Bureau of Indian Standards ("BIS"), which was founded in 1947, and has a growing interest in ICT standards, as evidenced by the formation of the Telecommunications Standards Development Society, India ("TSDSI") in 2013, which was established to develop and contribute to global telecommunications standards while addressing India-specific requirements.

The digital economy of today is built on standards in many ways. We wouldn't have had hundreds of companies banding together to build the mobile wireless revolution and bind decades of engineering breakthroughs into the 2G, 3G, and 4G wireless cellular standards that now power the majority of our smartphones and tablets if we didn't have standards. Wifi (802.11) standards and goods would also not exist. Printers, cameras, and medical gadgets all work thanks to industry standards that allow diverse companies to collaborate on common solutions to technological issues. As a result, it is critical for the economy that standards-based innovation continues, and that all enterprises have incentives to engage in these standards freely, an issue that the SSOs have effectively addressed over the last several decades.

Although the value and benefits of standards are broadly understood by businesses and consumers, policymakers, regulators, and certain industry groups have recently expressed worry about them.

A theoretical, and more recently empirical, discussion on these issues is raging in various jurisdictions, including the United States and the European Union, and is now reaching India. Patents judged to be potentially crucial to the development of standards, known as standard-essential-patents ("SEPs"), have recently received a lot of attention in India. Three cases involving SEP licensing in the Delhi High Court (Ericsson v. Micromax, Ericsson v. Intex, and Ericsson v. Xiaomei), as well as pending investigations by the Competition Commission of India ("CCI") into Ericsson's SEP licensing methods, have drew widespread international attention. The newly created TSDSI has been working on developing its intellectual property rights ("IPR") policy for the standards it generates, and has enlisted the help of a number of companies active in international standards development.

This discussion of standards and SEPs is part of a bigger discussion on intellectual property rights and patents. It does, however, have certain distinguishing characteristics. By balancing diverse viewpoints, this study presents an overview of some of the fundamental concerns in the debate over SEPs and FRAND disputes in the literature, and places them in the context of recent SSO IPR policy deliberations, as well as judicial decisions and antitrust investigations in India. The remainder of the paper is laid out as follows: Part II of the report presents an overview of IPR policies in SSOs, which is pertinent to recent TSDSI discussions. Part III addresses concerns about "hold-up" in the standard-setting process and presents some metrics for a first-order empirical investigation of any influence on competition. Part IV examines how aggregate royalties should be considered in the context of standards-compliant items, as well as how any impact on

competition should be assessed. Part V examines current SEP-related instances in India. Part VI comes to a close.

## VALUATION OF PATENTS AND DETERMINATION OF ROYALTIES:

When it comes to applying IPR and competition rules to the licensing of SEPs, courts and regulators in India and around the world have faced a variety of challenges. To begin, one question being debated is whether cases featuring FRAND obligations are antitrust cases at all, as they have usually been dealt with under contract law (or tort law). The issue of jurisdiction is currently being debated in India, with cases involving the same parties involved in FRAND licensing conflicts being heard in both the Delhi High Court and the CCI, both of which are under examination. While the facts of the cases are covered in Part IV, this section focuses on the complicated and challenging problems that a competition authority must evaluate in light of attempts to use competition law to set or limit royalties under sophisticated commercial licence agreements.

When antitrust regulators set royalty rates, the price of a technology is determined by fact-specific merits on a case-by-case basis as they consider whether a certain royalty rate fairly and sufficiently pays innovators for their investment and risk. However, if this question is not answered correctly, it may have a significant impact on innovators' incentives to invest in hazardous R&D and manufacturers' incentives to deploy standards-compliant goods. Although some organisations have expressed worries about potential patent delays and excessive fees, competition authorities must seek specific evidence of anticompetitive impacts on an industry for a commercial dispute to be considered an antitrust problem. Of course, a central authority attempting to determine royalty rates and enact one-size-fits-all regulations, rather than allowing the markets to determine the rates based on good faith negotiations between parties under the threat of litigation, which can be initiated by either party, is an extremely difficult proposition. Some proposed measures to determine royalty rates are reviewed in this Part to provide a flavour of these issues and the mistakes that may occur.

First, some have expressed concern that using the price of an entire licenced device rather than specific components within the device as the royalty base for patent portfolios that enable specific wireless communications functionalities in the device could be anticompetitive and constitute abuse of dominance. For example, using the price of an entire licenced device rather than specific components within the device as the royalty base for patent portfolios that enable specific wireless communications functionalities in the device could be anticompetitive and constitute abuse of dominance. This is likely to raise a number of complicated and fact-specific issues. First and foremost, in this case, the wireless communications sector has a long and widespread practise of adopting end-user device pricing as the royalty base for a variety of practical reasons.

Licensing on the entire device rather than individual components, for example, greatly reduces the industry's transaction costs for large patent portfolios that comprise patents on numerous components of the device. Volumes and costs of devices are more easily determined. Second, the inventions included in the cellular standards have a system-wide impact, i.e., they contribute to the overall system's improvement. The value of such inventions may or may not be directly tied to where they are implemented, for example, in a chip or any other component in a specific area of the larger system. As a result, if confronted with this problem, regulators will need to carefully explore all options for imposing higher royalties

on devices with advanced functionality that take advantage of underlying technologies.

Antitrust economists have also proposed using a "incremental value test" to determine royalty rates, which means that only the incremental value of the patented invention over the next-best alternative should be used as a baseline for an acceptable royalty computation. The principle of incremental value has traditionally been described in terms of inventions that result in production cost savings. It implies that a patent holder should be compensated for the incremental increase that their patented technology provides over its closest competitor. For example, if a plate already exists and someone patents a design on a plate, the patent only covers the value of the plate design. Farrell, Hayes, Shapiro, and Sullivan propose the incremental value test for the calculation of reasonable royalties, based on an early theory that extends this to licensing and suggests that the price of a patent in the standard setting context should be commensurate with the price it could have obtained if there had been an auction among competing technologies prior to the standard being set (ex-ante). In a basic interpretation, one firm creates an invention valued at level X, while the other generates an invention valued at level Y, where  $X - Y = > 0$ . X has been chosen for inclusion in the standard. Only the first firm receives a royalty payment of X under this interpretation of the incremental value test, which is strictly lower than the full value of the technology X it contributes and, more crucially, may be strictly lower than the R&D expense of generating the technology X. To put it another way, this understanding of incremental value may only apply to a patent race comparison of alternatives, not to the beginning point of an innovation. Inventors must be motivated to develop new technologies in order for a competitive process or race to begin. Their incentive may be lowered if they are consistently compensated less than the R&D cost of participating in the innovation process. As a result, any proposal for incremental value must account for the ex-ante timescale, not only before a technology is chosen for inclusion in a standard, but also when companies are deciding whether or not to invest in R&D that could contribute to a standard.

Another suggestion has been to value SEPs using numeric proportionality. According to this suggestion, all patents necessary to the standard should be treated equitably and symmetrically because they all provide the same market power, or ex post hold-up power.<sup>30</sup> As a result of this premise, royalties that are proportional to the number of essential patents contributed to the standard are recommended. For example, a company that owns 100 SEPs out of 1000 total SEPs in a standard can claim 10% of the total fee that the standard can command. First, this simple rule contradicts the well-established empirical result in the patent literature that patents varied substantially in their innovative and economic significance, and that the patent value distribution is known to be extremely skewed. Second, not all patents considered important to the standard are genuinely necessary in terms of technology or business.

Any proposal that proposes a central planner approach to deciding royalties would have to consider these and other aspects on a case-by-case basis in order to arrive at acceptable incentives for all parties involved.

#### ICT STANDARDS AND FRAND PROCEEDINGS IN INDIA:

Despite being one of the world's major wireless cellular markets, Indian FRAND licensing processes for SEPs have only lately begun to take shape.

After years of failed licensing agreement negotiations with both parties, Ericsson, a well-known and leading inventor of wireless cellular technologies, filed a lawsuit in the Delhi High Court against Indian suppliers Micromax and Intex in 2013 and 2014, respectively, for infringement of its SEPs related to 2G and 3G technologies. Micromax and Intex, in turn, filed a complaint with the CCI, saying that Ericsson exploited its supposed dominant position by charging expensive royalties for its SEPs, in violation of the Indian Competition Act. The CCI determined that Ericsson had abused its dominant position on a prima facie basis in January 2014, and instructed the Director General ("DG") to investigate the charges. However, after Ericsson filed a writ petition contesting the CCI's jurisdiction in patent licensing issues, the court ordered the DG of the CCI to hold off on issuing any final orders/reports until the case is resolved in court. In December 2014, Ericsson filed an action in the Delhi High Court against the Chinese company Xiaomi Technology Company for infringement of its 2G and 3G SEPs. In May 2015, iBall, an Indian smartphone manufacturer, filed a complaint with the CCI against Ericsson.

The Delhi High Court has granted interim orders and computed appropriate royalties for the two FRAND-related patent infringement proceedings as of September 2015, while the CCI investigations are still ongoing. In this section, I provide a quick overview of the six FRAND proceedings to date, as well as a brief analysis of some of the important problems raised in these proceedings and their possible impact on the establishment of Indian jurisprudence on these topics.

#### 1. In the Delhi High Court, Ericsson v. Micromax:

Ericsson sued Micromax, an Indian mobile device manufacturer, in March 2013 for violation of its eight patents pertaining to 2G and 3G SEPs filed in India, seeking damages and a permanent injunction. After issuing an initial notice of infringement, Ericsson began licensing negotiations with Micromax in 2009, according to court filings. Ericsson and Micromax

finally agreed to negotiate a FRAND licence after repeated reminders, and Micromax agreed to pay the prices Ericsson suggested in November 2012 while negotiations were ongoing. Micromax, on the other hand, never agreed to licence Ericsson's SEPs, prompting Ericsson to bring a lawsuit.

The Delhi High Court granted Ericsson an injunction against Micromax based on the infringed 2G and 3G technology, and ordered Micromax to pay royalties to Ericsson ranging from 0.8-1.3 percent of the net selling price of the devices containing the infringed technology, following a hearing in December 2014. The Court required Ericsson to furnish comparable licences in order to calculate the royalty rates, and it based its estimate on 26 licences Ericsson had signed with other Indian parties. Micromax and the Customs department were also required to alert Ericsson when a consignment of Micromax devices arrived in India, according to the temporary agreement. The consignment will be cleared for release and immediately handed over to Micromax after an examination by an Ericsson expert. Following the transaction, Micromax will pay Ericsson royalties at the rate set by the Court.

#### 2. Intex v. Ericsson at the Delhi High Court:

Ericsson sued Intex in April 2014 for infringing on eight SEPs pertaining to 2G and 3G standards, seeking a permanent injunction and damages. The Delhi High Court issued an interim order against Intex in March 2015, granting an injunction and directing Intex to deliver the determined royalties to Ericsson. The case's circumstances are colourful, and the presiding judge, Justice Manmohan Singh, carefully considers them in his interim judgment.

Because Ericsson's asserted patents include 2G and 3G SEPs, any company that develops, uses, or sells products that conform with these standards infringes on these patents, according to Ericsson. Ericsson supplied documentation indicating that a licensing deal with Intex began in December 2008 and continued until 2013, but that no agreement was reached. Intex, Ericsson said, has taken two opposing positions on the validity and violation of Ericsson's SEPs. Intex continued to correspond with Ericsson about a potential licensing agreement in 2013, during which time Intex, on the one hand, initiated proceedings against Ericsson with the Intellectual Property Appellate Board ("IPAB") for the revocation of Ericsson's patents, and on the other hand, initiated a complaint against Ericsson with the CCI alleging abuse of dominance by Ericsson due to its patents. Because there was no convincing evidence of the validity of Ericsson's patents and damages were adequate to compensate Ericsson for its claim, Intex contended that the Court should not grant an injunction against it.

The Delhi High Court ruled that the asserted patents appear to be valid at first glance. The Court cited Intex's assertions in its complaint to the CCI that Ericsson's patents are important to 2G and 3G standards, leaving companies that comply with these standards with little choice but to incorporate these SEPs. Intex's complaint to the CCI, the Court said, is an acknowledgement of its infringement of Ericsson's SEPs. The Court also mentioned Intex's declaration before the IPAB, in which it admitted that the patents in question were intimately relevant to its business, implying that the patents in question were infringed. The Court determined that Intex was an unwilling licensee based on these facts and Intex's inconsistent views.

In addition, the Delhi High Court considered Ericsson's practise of charging royalties based on the price of the device to be consistent with its FRAND commitments, citing the US decision in *CSIRO v. Cisco*, in which the District Court for the Eastern District of Texas rejected the royalty base being based on the chipset price, and the Chinese decision by the National Development and Reform Commission ("NDRC") for Qualcomm's 3G and 4G SEPs, citing the US decision in *CSIRO*. Because the facts of both cases were identical, the Court upheld the royalty rates set in the *Ericsson v. Micromax* interim ruling.

Notably, the Delhi High Court's decision to grant an interim injunction to an unwilling licensee predates the European Court of Justice's recent landmark decision in *Huawei Technologies v. ZTE Corporation*, which provides useful guidance that a SEP owner does not abuse its dominant position when seeking injunctive relief against an unwilling licensee.

#### 3. In the Delhi High Court, Ericsson v. Xiaomi:

Ericsson sued Xiaomi in the Delhi High Court in December 2014 for the identical set of 2G and 3G SEPs that it had claimed against Micromax and Intex. Ericsson allegedly requested that Xiaomi seek a licence for its SEPs, but Xiaomi instead launched infringing items in India and established an Indian company to advertise the infringing products without first obtaining a licence. The court imposed an interim injunction prohibiting Xiaomi from importing or distributing infringing products into India. Xiaomi filed an appeal, claiming that its goods did not violate Ericsson's patents because it received the chipset implementing Ericsson's asserted copyrighted technology from Qualcomm Inc., which had a licence from Ericsson. For the time being, Xiaomi is only allowed to import and sell devices in India that use Qualcomm chipsets. Unlike the Micromax and Intex instances, the court has

not set a royalty rate.

#### CONCLUSION:

With the world's second-largest mobile market, India is a vital and appealing market for major global wireless communications companies, both in terms of supplying and selling goods, as well as establishing local manufacturing units and design centres. Policies and jurisprudence on SSO IPR policies and FRAND licencing disputes are currently being developed in India, and the concerns at the heart of all of these issues are currently being contested on a worldwide basis. It will be interesting to see how India shapes its policy on IP enforcement and FRAND licencing concerns in the international debate, but it will be even more essential in defining India's future in the global wireless value chain. The primary challenges for the ICT business are standard setting and related IPR regulations, therefore policies enacted by local SSOs, such as the newly constituted TSDSI, as well as growing jurisprudence on SEP-related matters in the courts and the CCI, will be essential in shaping the ICT industry's future in India. With the government's "Make in India" and "Design in India" initiatives, it's critical that the IPR policies adopted are appealing to both implementers and inventors of new technologies, allowing for profitable local investment in R&D and manufacturing, as well as for Indian activities to climb further up the value chain toward long-term innovation.

#### REFERENCES:

1. Case C-170/13, Huawei Technologies v. ZTE Corporation
2. Ericsson, Inc. v. D-Link Systems, Inc., Nos. 13-1625, -1631, -1632, -1633, at 54 (Fed. Cir. Dec. 4, 2014).
3. Judgment, Telefonaktiebolaget LM Ericsson v. Xiaomi Technology and Others, Interim Application No. 24580 of 2014 in Civil Suit (Original Side) No. 3775 of 2014, 1 – 2, High Ct of Delhi (Dec. 8, 2014)
4. Micromax Informatics Ltd v. Telefonaktiebolaget LM Ericsson, Case No. 50/2013, Competition Commission of India (Nov. 12, 2013)
5. Philippe Chappatte, FRAND Commitments—The Case for Antitrust Intervention, 5(2) EUR. COMPETITION J. 319, 340-43 (2009).
6. See, e.g., Mark Schankerman & Ariel Pakes, Estimates of the Value of Patent Rights in European Countries During the Post-1950 Period, 96(384) ECON. J. 1052 (1987).
7. See David J. Goodman & Robert A. Myers, 3G Cellular Standards and Patents, Paper Presented at IEEE WirelessCom 2005